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CITATIONS

739426—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. —

UNITED STATES OF AMERICA, CROSS-PETITIONER

v.

LEE ARENAS

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

On March 19, 1947, Lee Arenas filed a petition for a writ of certiorari in *Lee Arenas v. United States,* No. 1141, seeking review of that part of the judgment of the Circuit Court of Appeals which held that he was not entitled to trust patents for allotments to Francisco and Simon Arenas. A brief in opposition to the foregoing petition is being filed by the Government.

The Acting Solicitor General on behalf of the United States prays that, in the event the Court grants the petition for writ of certiorari in No. 1141, but only in that event, a cross-writ of certiorari be issued to the Circuit Court of Appeals to review that part of the judgment which holds that Lee Arenas is entitled to trust patents for

allotments to himself and his deceased wife. The certified transcript of record filed in No. 1141 includes those portions of the record upon which this cross-petition is based.

OPINIONS BELOW

The opinion of the District Court is reported in 60 F. Supp. 411. The opinion of the Circuit Court of Appeals (R. 612–674) is reported in 158 F. 2d 730.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 12, 1946 (R. 674–675). A petition for rehearing, filed by Arenas on January 13, 1947, was denied January 14, 1947. On February 28, 1947, Mr. Justice Douglas extended the time within which the United States might file a petition for certiorari to May 10, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether in passing upon allotments provided for by the Mission Indian Act the Secretary of the Interior is required to approve selections which are legally unobjectionable even if they result in unfair apportionment of available lands among those entitled to share therein.

2. Whether in disapproving a schedule of al-

lotments of land on the Agua Caliente or Palm Springs Band of Mission Indians the Secretary committed an abuse of discretion.

STATUTES INVOLVED

The pertinent provisions of the Mission Indian Act approved January 12, 1891, 26 Stat. 712, and of the Act of March 2, 1917, 39 Stat. 969, 976, are set forth in the Statement below.

STATEMENT

Section 4 of the Mission Indian Act, approved January 12, 1891, 26 Stat. 712, provides that "whenever any of the Indians residing upon any reservation patented under the provisions of this act shall, in the opinion of the Secretary of the Interior, be so advanced in civilization as to be capable of owning and managing land in severalty, the Secretary * * * may cause allotments to be made to such Indians, out of the land of such reservation," in specified quantities.[1] Section 5 of the Act declares:

> That upon the *approval* of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which shall be of the legal effect

[1] The Act of March 2, 1917, 39 Stat. 969, 976 "authorized and directed" the Secretary of the Interior to cause allotments to be made to the Mission Indians pursuant to sec. 17 of the Act of June 25, 1910, 36 Stat. 859, rather than as provided in section 4 of the Mission Indian Act.

> and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made * * *. [Italics supplied.]

On May 9, 1927, H. E. Wadsworth, an employee of the Department of the Interior, transmitted to the Department a schedule of 24 allotments of land on the Agua Caliente or Palm Springs Reservation of the Mission Indians (R. 66–67). Each allotment included three kinds of land: a two-acre town lot; five acres of irrigable land, and 40 acres of desert land. Among those on the schedule were Lee Arenas and his wife who had made their own selections and Francisco and Simon Arenas whose selections had been made for them in 1923 by Wadsworth and who had died before the 1927 schedule was prepared.

In 1936, the schedule not having been approved, certain members of the band sued to compel issuance of trust patents to 13 of the allotments contained in the schedule. The trial court dismissed the suits, 24 F. Supp. 237, and the Circuit Court of Appeals affirmed. *St. Marie* v. *United States,* 108 F. 2d 876. It held that until the Secretary of the Interior approved the selections, no right to allotments vested in the Indians. This Court denied a petition for certiorari because it was filed out of time. 311 U. S. 652.

Thereafter, Lee Arenas, who had not been a party to the *St. Marie* litigation, commenced this suit seeking the same relief. He sued to compel issuance to him of trust patents for the selections made by him and his wife (who had died in 1937) and for the selections made by Wadsworth for Francisco and Simon Arenas. The trial court entered a summary judgment of dismissal and the Circuit Court of Appeals, following its decision in the *St. Marie* case, affirmed. 137 F. 2d 199. This Court, however, granted certiorari, 320 U. S. 733, and, on May 22, 1944, reversed the judgment and remanded the case to the district court for further proceedings. *Arenas* v. *United States,* 322 U. S. 419.

Under date of December 13, 1944, the Commissioner of Indian Affairs recommended that the Secretary of the Interior disapprove the schedule (R. 303–340). The recommendation rested on five reasons. The first was that, if the schedule were approved, only a minority of the band would receive allotments. Thus, three had died before the 1927 schedule was prepared and 13 were foreclosed by the *St. Marie* decision. Only eight, therefore, of the approximately 50 members of the band would receive allotments under the schedule. (R. 327–331.) The second reason was that the schedule did not represent a proper exercise of the allotment policy. That policy contemplated that each Indian should be provided

with sufficient land to enable him to earn a living from his labor thereon. However, the land allotted was inadequate for this purpose. The 40-acre tracts were worthless for agriculture. Because of the small amount of theoretically irrigable land on the reservation five-acre tracts of such land could not be provided for all the Indians. The two-acre lots were too valuable for business purposes to be used for agriculture. (R. 331–333.) As a third reason for disapproval, the Commissioner pointed out that the selections were not of equal value. Though worthless for agriculture, five of the 40-acre tracts were in 1923 valued at $800.00 an acre or $32,000.00 each while the remainder possessed only nominal value. The five-acre tracts and the two-acre lots necessarily varied in value according to their proximity to the city of Palm Springs and its business district. (R. 333–335.) In the fourth place, Section 14, from which the two-acre lots were taken, was too valuable as a unit to be divided up. Located in the heart of the city and only a block from the business district, it would realize much more if it were sold or leased as a unit. On the other hand, the development of what would be left of the section after approval of the schedule would be seriously hampered; the presence of individual owners with their choice locations would be a fruitful source of controversy within the band. (R. 335–338.) Finally, the Commissioner said,

approval of the schedule and consequent allotment of the choicest areas would make it impossible to give equally valuable allotments to the remaining members of the band (R. 338–340).

On December 14, 1944, upon examination and consideration of the Commissioner's letter, the Assistant Secretary of the Interior adopted the Commissioner's reasons and disapproved the 1927 schedule (R. 340).

After a trial at which the Government put in evidence the letter of the Commissioner of Indian Affairs, the trial court entered judgment that Arenas was entitled to a trust patent for each of the four allotments (R. 90–95). The Circuit Court of Appeals reversed that part of the judgment granting trust patents for selections made by Wadsworth for Francisco and Simon Arenas (R. 666–672). It is to review that holding that Lee Arenas has filed a petition for certiorari in No. 1141.[2]

However, the court below affirmed the award to Arenas of trust patents on account of allotments to him and his wife. It held that the Secretary of the Interior could determine whether the land was subject to allotment and the pros-

[2] The holding was that the Indians did not acquire any rights under the 1923 schedule because Wadsworth had made the selections for them and he was not authorized to do so and that, since they had acquired no rights to trust patents, they were erroneously included in the 1927 schedule which was prepared after their deaths (R. 666–672).

pective allottee was eligible, but that once the regularity and the legality of a schedule were established, the Secretary was bound to approve it and to grant trust patents and that he could not refuse to do so on equitable considerations (R. 660–661). It further held that, if the Secretary possessed any discretionary power in passing upon a schedule, he had abused that power in the instant case (R. 661).

REASONS FOR GRANTING THE WRIT

1. In holding that in passing upon allotments for Mission Indians the Secretary of the Interior may not determine whether the allotments equitably apportion the land among those entitled to share therein (R. 661), the court below has laid an undue restraint upon the functions of that officer. While it is clear that the Secretary is empowered to reject proposed allotments because they are not lawful, it does not follow that his authority extends no further. In so limiting the Secretary, the court below relied on *Payne* v. *New Mexico,* 255 U. S. 367, and a decision of the Solicitor for the Department of the Interior, 57 I. D. 16. In the *Payne* case, this Court held that, in passing upon a lieu land selection, the Secretary of the Interior was required to give effect to the conditions existing when the selection was made and that, if it was then valid, it could not be disapproved by reason of a subsequent change in con-

ditions. The Solicitor's ruling (57 I. D. 16) was that the Secretary could not disapprove allotment selections for reasons not related to the merits of the individual selections. Neither ruling involved the question of the Secretary's power to prevent unequal or inequitable allotments. Neither, therefore, warrants the view that, in the case of the Mission Indians, the Secretary was compelled to approve allotments which, as pointed out by the Commissioner, were unfair as between allottees and which would make impossible an equal division of lands among those entitled to share in them. Indeed when reference is had to the reasons which persuaded the Secretary, it is hard to see how, short of an express statutory prohibition, he could be denied the power to prevent the unfortunate consequences which would result from approving this schedule.

2. In holding that the Secretary's disapproval of the schedule constituted an abuse of discretion (R. 661), the court below reached a conclusion which is without support in the record. There is no foundation for the court's view that the Secretary was guilty of neglect and inordinate delay in acting on the schedule. The Secretary construed the statute as giving him discretion to withhold action on a schedule. This construction was sustained in the *St. Marie* litigation and was not overturned until May 1944 when this Court reversed the Circuit Court of Appeals. In December 1944, the Secretary disapproved the

schedule. Plainly, the Secretary was justified in relying on the construction of the statute enunciated in the *St. Marie* case. It is equally plain that he acted promptly thereafter. As a further basis for its conclusion, the court below has assailed as "specious and colorable" the reasons assigned by the Secretary. The opinion contains nothing to support this characterization. Nor does the record. Seemingly, it rests upon the view that the Commissioner of Indian Affairs was opposed to the policy of allotments. (See R. 629, 632, 647.) It is submitted, however, that, even if this were so, it falls far short of demonstrating the want of substance in the reasons given by the Commissioner and affords no warrant for holding that, in disapproving the schedule because of those reasons, the Secretary committed an abuse of discretion. We do not construe this Court's opinion in *Arenas* v. *United States,* 322 U. S. 419, as denying the Secretary authority to disapprove allotments on such grounds.

CONCLUSION

For the reasons stated, and on the condition that the petition in No. 1141 is granted, it is respectfully submitted that this cross-petition for a writ of certiorari be granted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

APRIL 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947